(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 0 8 2013 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 2, 2010, the AAO dismissed the appeal. Counsel filed a motion to reopen and a motion to reconsider (MTR) the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner is a physician's office. It seeks to employ the beneficiary permanently in the United States as a medical and health services manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree. The director denied the petition accordingly. The AAO affirmed this determination on appeal.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

In dismissing the appeal, the AAO noted that the instant Form I-140 was filed on October 30, 2006. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. However, the ETA Form 9089 states the minimum requirements for the job offered is a bachelor's degree in health care management or medicine and 18 months of experience in the job offered. Thus, the AAO concluded that the petitioner has not established that the ETA Form 9089 demonstrates that the job requires a professional holding an advanced degree and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree.

In support of its current motion the petitioner submits copies of advertisements for the proffered position, all of which specified that a bachelor's degree and five years of experience were required. This evidence is not new, and was already considered by the AAO in its initial decision dismissing the petitioner's appeal. The fact remains that the certified ETA Form 9089 only requires 18 months of experience along with a bachelor's degree. As such, the labor certification does not support the classification of the proffered position as an advanced degree professional, requiring a bachelor's degree and five years of progressive experience in the specialty.

In its current motion the petitioner calls the 18 months of experience requirement a "typographical error" and asserts that the original ETA Form 9089 was withdrawn and replaced with a new one that requires five years of qualifying experience. The record is at odds with the petitioner's claim. The

photocopied ETA Form 9089 submitted with the motion bears no evidence of having been certified by the DOL. Moreover, the signatures of the petitioner's president and the beneficiary on the "new" ETA Form 9089 are dated July 1, 2006, which was two and a half months before the signature dates on the ETA Form 9089 that was certified by the DOL – September 18, 2006.

The requirements for a motion to reopen are set forth at 8 C.F.R. § 103.5(a)(2):

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As further provided in 8 C.F.R. § 103.5(a)(4), "A motion that does not meet applicable requirements shall be dismissed."

The petitioner has presented no new facts or documentation, as required in a motion to reopen, to refute the prior determinations of the Director and the AAO that the certified ETA Form 9089 does not support the classification of the proffered position and the instant beneficiary as an advanced degree professional. Furthermore, the petitioner has not presented any persuasive argument and/or pertinent precedent decisions showing that the prior decisions were based on an incorrect application of law or USCIS policy, as required in a motion to reconsider. Therefore, the petitioner's pending motion does not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) or a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

Finally, the motion will be dismissed as untimely. 8 C.F.R. § 103.5(a)(1)(i). The AAO mailed its decision to the petitioner and counsel at their last known addresses in conformance with 8 C.F.R. § 103.8. Therefore, service was complete on February 2, 2010. However, the motion was not filed until April 9, 2010, over 2 months later. Therefore the motion must be dismissed as untimely.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be

dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.